Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1840

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

KULALANI, LTD., *et al.*,
Petitioners,

v.

LILLIAN HAGOPIAN COREY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION OF RESPONDENTS COREY AND LOUI

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BRIEF IN OPPOSITION OF RESPONDENTS COREY AND LOUI

To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States

The Respondents, Lillian Corey and Herbert and Alberta Loui, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 892 F.2d 829 (9th Cir. 1989).

COMMENTS ON INACCURACIES IN STATEMENT OF FACTS

The petition misleadingly presents some pertinent facts, when it repeatedly characterizes the activities of the trial court as *ex parte* communications with Corey. A careful reading of the petition reflects that these supposed *ex parte* communications did not consist of unofficial or off-the-record contacts between Corey and the trial judge. They consisted of proceedings that were

quite properly held *in camera*: the first being a September 2, 1987, hearing on the motion of Corey's court-appointed counsel for leave to withdraw [1] and the second being a May 27, 1988, hearing on Corey's motion for a continuance of the hearing on the confirmation of the plan so that she could obtain additional counsel.[2] Since both proceedings could be expected to turn upon privileged or confidential matters discussed between Corey and her counsel, and since the issue raised by those motions (i.e., Corey's legal representation) did not directly affect any other party-in-interest, the court quite properly excluded from the courtroom everyone except Corey, her counsel, and the court personnel. It then conducted a hearing on the two motions *on the record.*

The intimation that Corey and the trial judge were collaborating behind the back of the other parties as to contested issues is wholly unwarranted. The communications in question were part of the court's conduct of its official business, on the record and in the customary way for matters of that type and sensitivity.

Finally, there is one additional factual matter as to which the this Court should be aware in assessing the petition. As explained below, at the trial level, none of the petitioners argued that 28 U.S.C. Section 455(a) created an exception to the extrajudicial source rule. The only petitioner who alluded to this argument in the Circuit Court was William Ellis, *pro se.* Mr. Ellis held no interest in the Silversword Inn property at the time that Respondent Corey filed her petition under Chapter 11 of the Bankruptcy Code, and was dismissed from Corey's adversary proceeding relating to that property (at his own request, *see* Appendix A) on that basis. Ellis never subsequently presented evidence that he later acquired an interest in the Inn. Long after Corey com-

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[1] Petition at 13.

[2] Petition at 9.

menced litigation to assert her claim to the Silversword Inn and long after a Notice of Pending Action as to Corey's claim had been filed, Petitioner Kulalani deeded its interest in the Inn to Petitioner Florence Ellis, who immediately deeded it to The Auna Foundation. These transactions occurred within seven weeks of the trial of Corey's ownership claims. *See* Appendices B and C (admitted into evidence by Petitioner Auna at the trial). The deed to Petitioner Auna refers to a 1987 lease on the premises originally held by Kula 469, Inc. and assigned to Ellis on April 13, 1988, two months before the trial. Then, without formally seeking or obtaining leave to intervene into that trial,[3] Ellis appeared at trial *pro se* to contest Corey's ownership claim. This last-minute maneuvering to interject himself into a case from which he had been dismissed at his own request two years prior provides a shaky foundation from which to argue that the judgment after trial should be vacated because of the appearance of partiality against *him*.

REASONS WHY THE PETITION SHOULD BE DENIED

Pursuant to Rule 15.1, Lillian Corey, the Appellee below, asks this Court to deny the petition for a writ of certiorari for three reasons:

1. There is no conflict among the circuit courts of appeal with respect to the application of 28 U.S.C. Section 455(a) to the "extrajudicial source" rule.
2. The issues presented could not be decided on their merits because the substantial consummation of the bankruptcy plan of Lillian Corey and the sale of the asset in dispute (the Silversword Inn) has made the issues moot.
3. Neither the decision below nor the record raises the Question Presented in the petition as to the effect of 28 U.S.C. Section 455(a) on the "extrajudicial source" rule.

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[3] *See* Petitioners' Appendix, p. 16, n.4.

These arguments are presented below. With the exception of the Petitioners' erroneous assertions as to a conflict among the circuits, the Petitioners do not claim that any of the considerations mentioned in Rule 10.1 of this Court's rules on the granting of certiorari apply.

I. CERTIORARI IS NOT REQUIRED TO RESOLVE A CONFLICT AMONG THE CIRCUIT COURTS.

The Petitioners assert a conflict among the circuits as to the construction of 28 U.S.C. Section 455(a) that does not exist. All circuits agree that bias or prejudice arising from a judicial source is ordinarily not a basis for disqualification under the statute. All circuits which have addressed the issue also agree that, in exceptional cases where a judge's performance of her official functions has led to "pervasive bias," disqualification under Section 455(a) may be required. This is the law in the Ninth Circuit and was probably the law in effect even prior to the 1974 amendments enacting Section 455(a).[4]

In the First Circuit, *United States v. Giorgi*, 840 F.2d 1022 (1st Cir. 1988) held that "disqualification for personal bias or prejudice necessitates a showing that the alleged bias be both personal and extrajudicial." *Id.* at 1035. "Although the knowledge of a defendant gained during a judicial proceeding *may* [emphasis in original] present grounds for a reasonable person to question a judge's impartiality, . . . mere exposure to prejudicial information does not . . . establish the requisite factual basis." *Id.*

The Second Circuit has adopted the requirement that bias must be extrajudicial, but has never addressed the possibility of an exception to the requirement for extreme cases of bias from a judicial source. *In re Inter-*

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[4] *See, Mayberry v. Pennsylvania*, 400 U.S. 455, 91 S.Ct. 499, 27 L.Ed. 532 (1970) (the due process clause prohibits a trial judge who has been vilified by a defendant from presiding over the defendant's subsequent trial for contempt).

national Business Machines Corp., 618 F.2d 923 (2d Cir. 1980); *In re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307 (2d Cir. 1988), *cert. denied*, 109 S.Ct. 2458 (1989). The state of the law is similar in the Fourth Circuit. The Fourth Circuit believes that

> "doubtless it is true that neither an appellate nor a trial judge is disqualified from sitting in a case because of an earlier decision in which he participated, of a similar case involving other parties . . . . The principle that the source of the bias or partiality must be extrajudicial, however, has always had its limitations." *Rice v. McKenzie*, 581 F.2d 1114, 1117-18 (4th Cir. 1978).

One exception precludes a federal judge from reviewing his own decision on the merits while he was a state judge. *Id.; United States v. Parker*, 742 F.2d 127 (4th Cir. 1984), *cert. denied*, 469 U.S. 1076, 105 S.Ct. 575 (1984). The possibility of another exception for "pervasive bias" has not been addressed in the Fourth Circuit.

In the Third Circuit, the Court tends toward the view that Section 455(a) changes only the standard which a district judge is to apply in reviewing disqualification motions, and that extrajudicial bias is still an essential requirement. *United States v. Vespe*, 868 F.2d 1328 (3d Cir. 1989). Whether an exception would be implied in the case of "pervasive bias" arising from judicial sources has yet to be established there.

While the Fifth Circuit recognizes that Section 455 generally requires disqualification for bias only where the bias has an extrajudicial source, *In re Beard*, 811 F.2d 818 (5th Cir. 1987), it has also recognized an exception for "pervasive bias and prejudice" shown by judicial conduct. *United States v. Phillips*, 664 F.2d 971, 1003 (5th Cir. 1975). Similarly, in the Sixth Circuit, "impressions based on information gained in the pro-

ceedings are not grounds for disqualification in the absence of pervasive bias." *In re M. Ibrahim Khan, P.S.C.*, 751 F.2d 162, 164 (6th Cir. 1984). The same approach is taken in the Eighth Circuit, *Davis v. C.I.R.*, 734 F.2d 1302 (8th Cir. 1984), in the Ninth Circuit, *United States v. Monaco*, 852 F.2d 1143 (9th Cir. 1988), *cert. denied*, 109 S.Ct. 864 (1989), in the Tenth Circuit, *United States v. Page*, 878 F.2d 1476 (10th Cir. 1989) and in the Eleventh Circuit. *Jaffe v. Grant*, 793 F.2d 1182 (11th Cir. 1986), *cert. denied*, 480 U.S. 931, 107 S.Ct. 1566, 481 U.S. 1051, 107 S.Ct. 2186 (1987).

The Seventh Circuit views the term "personal" bias as meaning bias from an extrajudicial source. *United States v. Balistrieri*, 779 F.2d 1191 (7th Cir. 1985), *cert. denied*, 475 U.S. 1095, 106 S.Ct. 1490 (1986). As in the Second, Third and Fourth Circuits, the Seventh Circuit has yet to determine whether to recognize an exception for bias arising from judicial sources that is "pervasive."

Certiorari therefore need not be granted to resolve conflicts in principle among the circuit courts. Such conflicts do not exist, although some circuits have no precedent on the question whether there is a "pervasive bias" exception to the "extrajudicial source" requirement. The Ninth Circuit's decision in this case neither created nor expanded such a conflict.

As discussed in Section III, *infra*, the Petitioners did not argue for nor support any claim to the "pervasive bias" exception in the lower courts. However, even if one assumed that the Ninth Circuit committed error in the instant case by failing to consider whether the circumstances qualified for the "pervasive bias" exception, this is not a matter of national significance. The application of established standards of disqualification to the facts below in a case involving only property rights is not a matter of national import, and is therefore unworthy of this Court's attention.

II. CERTIORARI IS IMPROVIDENT BECAUSE THE APPEAL IS MOOT.

Certiorari should not be granted where relief on the merits is moot. The instant appeal is moot for two reasons: (a) the bankruptcy plan from whose confirmation the appeal has been taken has been substantially consummated; and (b) the Silversword Inn (i.e., the real property whose title was the primary subject of the appeal below) has been sold during the pendency of the appeals, pursuant to 11 U.S.C. Section 363.

When no stay is obtained from an order confirming a bankruptcy plan and the plan is substantially consummated during the pendency of an appeal, the appeal becomes moot and subject to dismissal. *Miami Center, Ltd. Partnership v. Bank of New York*, 820 F.2d 376 (11th Cir. 1987), *reh'g denied*, 826 F.2d 1010 (1987), *vacated on denial of reh'g*, 838 F.2d 1547, *cert. denied*, 109 S.Ct. 69, 102 L.Ed.2d 46 (1988); *In re AOV Industries, Inc.*, 792 F.2d 1140 (D.C. Cir. 1986). The mootness rule in bankruptcy developed from two principles: the general rule that the occurrence of events which prevent an appellate court from granting effective relief renders an appeal moot, and the particular need for finality in bankruptcy. *In re Onouli-Kona Land Co.*, 846 F.2d 1170, 1172 (9th Cir. 1988).

In the instant case, substantial consummation of the bankruptcy plan has taken the form of the debtor's cash payment of $200,000 to her unsecured creditors (the Louis) and her conveyance pursuant to the plan, by general warranty deed, of the Silversword Inn property whose title was the subject of this litigation. In exchange, the Louis have recorded a satisfaction of judgment with respect to the 1984 judgment (and judgment lien) which they obtained against the debtor. Appendices D and E. This satisfaction of the $1.2 million claim of the Louis' allowed in the bankruptcy proceeding was approved by the bankruptcy court on February 21, 1990, after a hear-

ing conducted on February 12, 1990, which Petitioner Ellis did not attend. Appendix F.

In addition to the mootness issues arising from the substantial consummation of the plan, mootness results from Section 363(m) (i.e. 11 U.S.C. Section 363(m)) of the Bankruptcy Code. The effect of this Section is that "when an order confirming a sale to a good-faith purchaser is entered and a stay of that sale is not obtained, the sale becomes final and cannot be reversed on appeal." *In re Stadium Management Corp.*, 895 F.2d 845, 847 (1st Cir. 1990), quoting *In re Saco Local Development Corp.*, 19 B.R. 119, 121 (Bankr. 1st Cir. 1982). Absent a stay, the court must dismiss a pending appeal as moot because the court has no remedy that it can fashion even if it would have determined the issues differently. *In re The Charter Co.*, 829 F.2d 1054 (11th Cir. 1987) (per curiam), *cert. denied*, 485 U.S. 1014, 108 S.Ct. 1488, 99 L.Ed.2d 715 (1988); *In re Sax*, 796 F.2d 994 (7th Cir. 1986). Corey's sale of the Inn to the Louis while the appeal was pending cannot be reversed or impugned by vacating the judgment below as to her ownership of the Inn.

The circuit courts have applied the provisions of Section 363(m) even where the purchaser at the sale was a party to the appeal, so long as the purchase was not subject to statutory rights of redemption. *In re Onouli-Kona Land Co., supra*; *Markstein v. Massey Assoc., Ltd.*, 763 F.2d 1325 (11th Cir. 1985); *In re Bel-Air Assoc., Ltd.*, 706 F.2d 301 (10th Cir. 1983).

In the instant case, although the Petitioners requested stays of the various orders of the bankruptcy court from that court, from the Ninth Circuit, and from Justices O'Connor and Stevens, no stays were issued.

Consequently, the granting of certiorari in the instant circumstances would be improvident. It would involve the Court in the process of evaluating the merits of an appeal which was subject to dismissal for mootness.

III. CERTIORARI IS IMPROVIDENT BECAUSE THE PETITIONERS DID NOT RAISE BELOW THE ISSUES WHICH THEY NOW SEEK TO ARGUE.

The issue of general application which the petition seeks to raise is whether 28 U.S.C. Section 455(a) changed the requirement that the source of disqualifying bias or prejudice must be extrajudicial. Because the claim that 28 U.S.C. Section 455(a) modified or eliminated the requirement of an extrajudicial source of bias was not presented at all in the trial court or meaningfully presented in the circuit court, this would not be a proper case for the exercise of this Court's discretionary power of appellate review.

The first time Section 455(a) was invoked in the trial court by any of the Petitioners was the suggestion of recusal filed on August 19, 1988 by only one of the Petitioners, William Ellis. Ellis' suggestion makes no reference to any exception to the general requirement that any actual bias of the court have an extrajudicial source. The authority on which Ellis relied consisted solely of *In re Murchison*, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955), a case decided nineteen years before the 1974 amendments which created the current Section 455(a).

The trial court's denial of this suggestion for recusal cited this Court's decision eleven years after *Murchison*, namely, *United States v. Grinnell Corp.*, 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966), for the requirement of an extrajudicial source of the bias. The issue whether an exception to that requirement might exist for bias so pervasive as to make it appear that the trial judge could not impartially sit in judgment was neither raised nor addressed in the trial court.

On November 4, 1988, Ellis (but none of the other Petitioners) again raised the issue whether recusal was proper under Section 455(a). As before, Ellis did not argue that bias derived from a judicial source can be a

basis for disqualification under Section 455(a). Instead, he claimed that Judge Pence was disqualified by virtue of bias arising from an extrajudicial source:

> "The 'wheeler and dealer' bias against the undersigned [Ellis], as expressed by Judge Pence in *ex parte* colloquy with the Debtor on May 27, 1988 [proceedings on Corey's request for a continuance to replace her counsel] is clearly 'a bias that is not derived from the evidence or conduct of the parties that the judge observes in the course of the proceedings.'" Appendix G. (The quotation is from *Johnson v. Trueblood*, 629 F.2d 287 (3rd Cir. 1980)).

The November suggestion of recusal then cites and quotes extensively from *Knapp v. Kinsey*, 232 F.2d 458 (6th Cir. 1956), *reh'g denied*, 235 F.2d 129, *cert. denied*, 352 U.S. 892, 77 S.Ct. 131, 1 L.Ed.2d 86 (1956), another case decided long before the current Section 455(a) was enacted. Finally, the recusal pleading concludes that

> ". . . [T]he Honorable Martin Pence has clearly indicated by all of the conduct described above quotation from *Knapp v. Kinsey*, a *personal* (i.e., extrajudicial) bias and prejudice which mandates a *sua sponte* recusal pursuant to Section 455(a) and/or 455(b)(1) . . . .
>
> This extrajudicial bias and prejudice is respectfully challenged by invoking the Congressional mandate of Section 455 . . . ." [Emphasis in original.]

The trial court's decision on the November suggestion for recusal correctly understood it as another claim that the court was biased from an extrajudicial source, and found that all sources of alleged bias relied on by Ellis were judicial sources:

> "The alleged bias and prejudice—if there was one, but the alleged bias and prejudice could have arisen solely out of judicial proceedings. The motion for recusal is denied." App. at 31.

The disqualification issue raised and decided twice at the trial level was not the one now raised by the petition, i.e., "the applicability of the 'extrajudicial source' rule to § 455(a)." *Petition* at 20. The only issue at the trial level was whether the source of the bias was extrajudicial.

The Petitioners' appellate record is similarly deficient on the question which the Petitioners now seek to present to this Court by way of their petition. The Petitioners filed three sets of briefs in the Ninth Circuit, one set for each of the appeals decided in the Ninth Circuit's 1989 opinion. The opening briefs of Petitioners Ryan, Kulalani, Florence Ellis and Auna make no reference whatsoever to Section 455(a), nor to any exception which the 1974 legislation may have created to the "extrajudicial suorce" requirement. One of the opening briefs of William Ellis *does* make reference to Section 455, but repeats the contention rejected below: that Judge Pence had a personal bias derived from an extrajudicial source:

> "The *in camera* proceedings on September 2, 1987 and May 27, 1988, . . . were 'something other than rulings in the case' and were, therefore 'extrajudicial' [citations omitted] . . . .
>
> Judge Pence was mandated . . . to be especially solicitous in maintaining the appearance and reality of impartiality and proceed no further in matters involving Ellis vs. Corey because of his personal, extrajudicial bias or prejudice against Ellis and in favor of Corey." (C.A. Nos. 88-15351 and 88-15595, Ellis O.B. at 43, 46.)

Finally, as an afterthought and without benefit of citation to any of the legislative or judicial authority on which he now attempts to rely in the petition, the Ellis brief contains a one-sentence argument that

> "Even if Judge Pence, by his rationale, should not be extrajudicially biased or prejudiced against ELLIS and in favor of COREY, the record on appeal

> would indicate to any reasonable person the unmistakable *appearance* of partiality." *Id.*, O.B. at 46. [Emphasis in original.]

No citation to the cases from the jurisdictions which Ellis now claims to be in conflict with Ninth Circuit precedent was set forth, nor did Ellis cite the Ninth Circuit's own decision in *United States v. Monaco*, 852 F.2d 1143 (9th Cir. 1988), which expressly refers to the "pervasive bias" exception to the extrajudicial source requirement. In his briefs below, Ellis also failed to discuss the relationship of this argument to *United States v. Grinnell Corp.*, the decision of this Court on which both Judge Pence and the Ninth Circuit ultimately relied. Ellis similarly failed to address the question of legislative intent in connection with the 1974 amendments of 28 U.S.C. Section 455. Instead, Ellis cited only the Ninth Circuit's decision in *In re Manoa Finance, Inc.*, 781 F.2d 1370 (9th Cir. 1986), *cert. denied*, 479 U.S. 1064, 107 S.Ct. 948, 98 L.Ed.2d 997, *reh'g denied*, 480 U.S. 941, 107 S.Ct. 1594, 94 L.Ed.2d 783 (1987), a decision which is not even mentioned in the petition for certiorari.

Being presented with no argument in the trial court and no ruling by the trial court on the claim that the "extrajudicial source" rule was inapplicable to Section 455(a), and hearing no meaningful argument on the issue at the appellate level, the Ninth Circuit's decision from which this petition is taken failed to address the argument. The opinion of the Ninth Circuit does not refer in its discussion of judicial bias to Section 455(a), and therefore does not establish any conflict with the rule which Ellis claims the circuits have divided on: that there are exceptional circumstances in which Section 455(a) would require recusal even if the trial court's bias arises exclusively from judicial sources. The Ninth Circuit's opinion addresses only the issue which was presented to and decided by the trial court:

> "In this case, the record shows clearly that, to the extent the learned district judge was inclined to rule against Appellants, this was the product of his knowledge of the facts of the case gained during judicial proceedings, not of extrajudicial information." App. at 21.

Before this Court is called upon to address the Question Presented relating to Section 455(a), it should have the benefit of a fully developed record below. Instead, the petition seeks to present to this Court an issue that was not presented at all to the trial court, was merely hinted at in the briefs below and was never discussed by the Court of Appeals. This is grounds for the denial of certiorari. *Equal Employment Opportunity Comm'n v. Federal Labor Relations Bd.*, 476 U.S. 19, 106 S.Ct. 1678, 90 L.Ed.2d 19 (1986). The resolution of the legal issue raised by the petition should be reserved for a case in which the matter has been squarely raised and decided below.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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KESSNER, DUCA & MAKI
220 South King Street
Suite 1900
Honolulu, Hawaii 96813
(808) 522-1900
Counsel for Respondents - Lillian Hagopian Corey, Herbert and Alberta Loui

APPENDICES

APPENDIX A

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF HAWAII

Adversary Proceeding No. 85-0185

In re Case No. 84-00371
Chapter 11

LILLIAN HAGOPIAN COREY,
Debtor

LILLIAN HAGOPIAN COREY,
Debtor,

vs.

KULALANI, LTD., *et al.*,
Defendants.

NOTICE OF DISMISSAL OF AFFIRMATIVE CLAIMS AND WITHDRAWAL OF ANSWER TO AMENDED COMPLAINT

Pursuant to Bankruptcy Rule 7041, applying Rule 41 (a) (1) (i), F.R.Civ.P., Defendant WILLIAM S. ELLIS, JR., hereby dismisses without prejudice those Affirmative Claims contained within Answer to Amended Complaint by Defendant William S. Ellis, Jr., Containing Affirmative Claims, filed herein on June 23, 1986.

Defendant also hereby withdraws without prejudice said Answer to Amended Complaint filed June 23, 1986, and, by way of response to the Amended Complaint, relies instead upon Notice of Automatic Stay of Actions Against Defendant William S. Ellis, Jr., and Request

to Be Dropped as Party, filed herein on September 12, 1985.

DATED: Honolulu, Hawaii, December 16, 1986.

/s/ William S. Ellis, Jr.
WILLIAM S. ELLIS, JR.
Defendant, pro se

Certificate of Service: I hereby certify service of a copy of this paper upon counsel for the Debtor and upon Helen B. Ryan, Esq., Walter R. Schoettle, Esq., and Ivan M. Lui-Kwan, Esq., by mail or delivery on December 16, 1986.

/s/ William S. Ellis, Jr.
WILLIAM S. ELLIS, JR.

APPENDIX B

Recordation Requested by: FLORENCE A. ELLIS

After Recordation, Return to:

FLORENCE A. ELLIS
RR 1, BOX 428A
Kula, Hawaii 96790

Return by MAIL

WARRANTY DEED

KNOW ALL MEN BY THESE PRESENTS:

That KULALANI, LTD., a Hawaii corporation, of Honolulu, Hawaii, hereinafter called the "Grantor," for and in consideration of the sum of ONE MILLION DOLLARS ($1,000,000.00) and other good and valuable consideration to it in hand paid by FLORENCE A. ELLIS, wife of William S. Ellis, Jr., whose residence and post office address is RR1, Box 428A, Kula, Hawaii 96793, hereinafter called the "Grantee," the receipt whereof is hereby acknowledged, does hereby grant and convey unto the Grantee, and to her heirs, personal representatives, and assigns, all of the Grantor's beneficial interest in and to the following described property:

ALL of that certain parcel of land situate on Haleakala Road (FAP 5B) at Omaopio, Kula, District of Makawao, Island and County of Maui, State of Hawaii, being a portion of L.C.Aw. 281-B to Ali, being more particularly described in File Plan 382 as Lot 2, 4.05 acres, and bearing Tax Map Key designation 2nd Div. 2-3-20:11.

BEING that certain parcel of land conveyed to the Grantor by Warranty Deed dated September 1, 1980, and recorded in the Bureau of Conveyances of the State of Hawaii in Liber 14970 at page 588.

SUBJECT, HOWEVER, to the following:

1. The rights of native tenants as reserved in Land Commission Award 281-B to Ali.

2. The lien of the State of Hawaii for payment of commutation, if any, as provided in Section 172-2, HRS, no Patent having been issued to Ali, the Awardee under Land Commission Award 281-B.

3. That certain Grant dated October 5, 1960, in favor of Maui Electric Company, Ltd., granting a perpetual easement over, across, through, and under said Lot 2 for utility purposes, recorded in said Bureau in Liber 3936 at page 39.

4. That certain first mortgage in favor of LILLIAN H. COREY, unmarried, in the form of a defeasible deed dated March 1, 1971, vesting legal title in Bessie Hagopian, recorded in said Bureau in Liber 7435 at page 167, assigned to the said first mortgagee by instrument dated July 1, 1973, and recorded in said Bureau in Liber 9808 at page 315, the terms and provisions of said mortgage, sums secured thereby, and the interest paid and accrued thereunder being set forth with particularity in that certain Declaration of First Mortgage dated September 1, 1977, and recorded in said Bureau in Liber 12552 at page 231 (amended Liber 12569 at page 106), as supplemented by affidavits recorded in said Bureau in Liber 12568 at page 108, Liber 13306 at page 636, and Liber 14097 at page 380.

5. That certain Amended Second Mortgage in favor of RALPH E. COREY and UPLAND INVESTMENTS, LTD., dated August 15, 1984, and recorded in said Bureau in Liber 19176 at page 567.

6. That certain Amended Third Mortgage in favor of WILLIAM S. ELLIS, JR., dated December 1, 1980, and recorded in said Bureau in Liber 19176

at page 562 (the successor mortgagee being, by operation of law, HELEN B. RYAN, Trustee for the estate of William S. Ellis, Jr., Debtor, in BK No. 72-391, USBC Hawaii).

7. That certain Fourth Mortgage in favor of LEI-ANNE E. GROUARD, et al., dated December 1, 1980, and recorded in said Bureau in Liber 18291 at page 50; assigned to WILLIAM S. ELLIS, JR., as Debtor-in-Possession, BK No. 72-391, USBC Hawaii, by instruments of even date herewith and recorded in said Bureau in Liber 21931 at pages 122 and 124.

8. That certain Second Amended Indenture of Lease by and between the Grantor, as Lessor, and KULA 469, INC., Lessee, dated January 1, 1987, and recorded in said Bureau in Liber 20604 at page 544, assigned by the Lessee to WILLIAM S. ELLIS, JR., as Debtor-in-Possession, BK No. 72-391, USBC Hawaii, by instrument dated April 13, 1988, and recorded in said Bureau in Liber 21894 at page 271.

TO HAVE AND TO HOLD the same, together with improvements thereon and the rights, easements, privileges, and appurtenances thereunto belonging and appertaining, unto the Grantee, her heirs, personal representatives, and assigns, forever.

AND THE GRANTOR hereby covenants with the Grantee that it is lawfully seised in fee simple of the above granted premises and that it has good right to sell and convey the same; that the same are free and clear of encumbrances except as aforesaid and real property taxes; and that it will and its successors and assigns shall WARRANT and DEFEND the same unto the Grantee, her heirs, personal representatives, and assigns, against the lawful claims of all persons, except as aforesaid.

IN WITNESS WHEREOF, the undersigned Grantor has caused these presents to be duly executed as of the 1st day of May, 1988.

KULALANI, LTD.

By /s/ William S. Ellis, Jr.
WILLIAM S. ELLIS, JR.
Its President

STATE OF HAWAII)
) ss.
CITY & COUNTY OF HONOLULU)

On this 18th day of May, 1988, before me appeared WILLIAM S. ELLIS, JR., to me personally known, who, being by me duly sworn, did say that he is the Vice-President of KULALANI, LTD., a Hawaii corporation; that the seal affixed to the foregoing instrument is the corporate seal of said corporation; that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and the said WILLIAM S. ELLIS, JR., acknowledged said instrument to be the free act and deed of said corporation.

/s/ [Illegible]
Notary Public, State of Hawaii

My commission expires: 7-26-89

APPENDIX C

Recordation Requested by: THE AUNA FOUNDATION

After Recordation, Return to:

THE AUNA FOUNDATION
1088 Bishop St., Suite 1105
Honolulu, Hawaii 96813
Telephone: 521-0382

Return by PICK-UP

WARRANTY DEED

KNOW ALL MEN BY THESE PRESENTS:

That FLORENCE A. ELLIS, wife of William S. Ellis, Jr., of Kula, Maui, Hawaii, hereinafter called the "Grantor," for and in consideration of the sum of TEN DOLLARS ($10.00) and other good and valuable consideration to her in hand paid by THE AUNA FOUNDATION, a Hawaii nonprofit corporation, whose principal office is at 1088 Bishop Street, Suite 1105, Honolulu, Hawaii, hereinafter called the Grantee," the receipt whereof is hereby acknowledged, does hereby grant and convey unto the Grantee, and to its successors and assigns, all of the Grantor's beneficial interest in and to the following described property:

All of that certain parcel of land situate on Haleakala Road (FAP 5B) at Omaopio, Kula, District of Makawao, Island and County of Maui, State of Hawaii, being a potrion of L.C.Aw. 281-B to Ali, being more particularly described in File Plan 382 as Lot 2, 4.05 acres, and bearing Tax Map Key designation 2nd Div. 2-3-30:11.

BEING that certain parcel of land conveyed to the Grantor by Warranty Deed of even date herewith and intended to be recorded concurrently herewith.

SUBJECT, HOWEVER, to the following:

1. The rights of native tenants as reserved in Land Commission Award 281-B to Ali.

2. The lien of the State of Hawaii for payment of commutation, if any, as provided in Section 172-2, HRS, no Patent having been issued to Ali, the Awardee under Land Commission Award 281-B.

3. That certain Grant dated October 5, 1960, in favor of Maui Electric Company, Ltd., granting a perpetual easement over, across, through, and under said Lot 2 for utility purposes, recorded in said Bureau in Liber 3936 at page 39.

4. That certain first mortgage in favor of LILLIAN H. COREY, unmarried, in the form of a defeasible deed dated March 1, 1971, vesting legal title in Bessie Hagopian, recorded in said Bureau in Liber 7435 at page 167, assigned to the said first mortgagee by instrument dated July 1, 1973, and recorded in said Bureau in Liber 9808 at page 315, the terms and provisions of said mortgage, sums secured thereby and the interest paid and accrued thereunder being set forth with particularity in that certain Declaration of First Mortgage dated September 1, 1977, and recorded in said Bureau in Liber 12552 at page 231 (amended Liber 12569 at page 106), as supplemented by affidavits recorded in said Bureau in Liber 12568 at page 108, Liber 13306 at page 636, and Liber 14097 at page 380.

5. That certain Amended Second Mortgage in favor of RALPH E. COREY and UPLAND INVESTMENTS, LTD., dated August 15, 1984, and recorded in said Bureau in Liber 19176 at page 567.

6. That certain Amended Third Mortgage in favor of WILLIAM S. ELLIS, JR., dated December 1, 1980, and recorded in said Bureau in Liber 19176 at

page 562 (the successor mortgage being, by operation of law, HELEN B. RYAN, Trustee for the estate of William S. Ellis, Jr., Debtor, in BK. No. 72-391, USBC Hawaii).

7. That certain Fourth Mortgage in favor of LEI-ANNE E. GROUARD, et al., dated December 1, 1980, and recorded in said Bureau in Liber 18291 at page 50; assigned to WILLIAM S. ELLIS, JR., as Debtor-in-Possession, BK No. 72-391, USBC Hawaii, by instruments of even date herewith and recorded in said Bureau in Liber 21931 at pages 122 and 124.

8. That certain Second Amended Indenture of Lease by and between KULALANI, LTD., Lessor, and KULA 469, INC., Lessee, dated January 1, 1987, and recorded in said Bureau in Liber 20604 at page 544, assigned by the Lessee to WILLIAM S. ELLIS, JR., as Debtor-in-Possession, BK No. 72-391, USBC Hawaii, by instrument dated April 13, 1988, and recorded in said Bureau in Liber 21894 at page 271.

TO HAVE AND TO HOLD the same, together with improvements thereon and the rights, easements, privileges, and appurtenances thereunto belonging and appertaining, unto the Grantee, its successors and assigns, forever.

RESERVING, HOWEVER, unto the Grantor a life estate in and to the rents, issues, and profits of the above grnated premises, up to and including THREE THOUSAND DOLLARS ($3,000.00) per month, cumulative, from the date hereof.

AND THE GRANTOR hereby covenants with the Grantee that she is lawfully seised in fee simple of the above granted premises and that she has good right to sell and convey the same; that the same are free and clear of encumbrances except as aforesaid; and that she will and her heirs and assigns shall WARRANT and DE-

FEND the same unto the Grantee, its successors and assigns, against the lawful claims of all persons, except as aforesaid.

IN WITNESS WHEREOF, the undersigned Grantor has hereunto set her hand as of the 1st day of May, 1988.

/s/ Florence A. Ellis
FLORENCE A. ELLIS
Grantor

STATE OF HAWAII)
) ss.
CITY & COUNTY OF HONOLULU)

On this 18th day of May, 1988, before me personally appeared FLORENCE A. ELLIS, to me known to be the person who executed the foregoing instrument and acknowledged that she executed the same as her free act and deed.

/s/ [Illegible]
Notary Public, State of Hawaii

My commission expires: 7-26-89

APPENDIX D

SECURITY TITLE CORPORATION

HEREBY CERTIFIES THAT THE ATTACHED IS

A TRUE COPY OF THE ORIGINAL DOCUMENT

FILED IN THE BUREAU OF CONVEYANES

OF THE STATE OF HAWAII

AS REGULAR SYSTEM DOCUMENT NO. 90-055529

ON April 19, 1980 AT 1:35 p.m.

By: /s/ [Illegible]

LAND COURT SYSTEM REGULAR SYSTEM

AFTER RECORDATION, RETURN BY MAIL ( ) PICKUP ( )

Security Title Corporation

WARRANTY DEED

Grantor:

LILLIAN HAGOPIAN COREY, individually and in her capacity as debtor in possession in Case No. P4-0071, United States Bankruptcy Court for the District of Hawaii

Grantee:

HERBERT LOUI and ALBERTA LOUI, husband and wife

PROPERTY DESCRIPTION:

Lot 2, portion of L. C. Aw. 281B, Omaopio, Kula, Maui, Hawaii	LIBER: 9808 PAGE: 315

WARRANTY DEED

THIS DEED, made this 22nd day of March, 1990, by LILLIAN HAGOPIAN COREY, individually and in her capacity as debtor-in possession in Case No. 84-0071, United States Bankruptcy Court for the District of Hawaii, of Honolulu, Hawaii, hereinafter called the "Grantor", and HERBERT LOUI and ALBERTA LOUI, husband and wife, whose residence and post office address is 1644 Ulupii St., Kailua, Hawaii 96734, hereinafter called the "Grantees",

WITNESSETH:

That in consideration of the sum of TEN AND NO/100 DOLLARS ($10.00) and other valuable consideration paid by the Grantees, the receipt of which is hereby acknowledged, the Grantor does hereby grant, bargain, sell and convey unto the Grantees, as Tenants by the Entirety, with rights of survivorship, and the survivor of them and his/her heirs and assigns, in fee simple:

> All of that certain parcel of land situate at Omaopio, Kula, County of Maui, State of Hawaii, more particularly described in Exhibit "A" attached hereto and made a part hereof.

And the reversions, remainders, rents, issues and profits thereof and all of the estate, right, title and interest of the Grantor, both at law and in equity, therein and thereto;

TO HAVE AND TO HOLD the same, together with all buildings, improvements, rights, easements, privileges and appurtenances thereon and therto belonging or appertaining or held and enjoyed therewith, unto the Grantees according to the tenancy herein set forth, forever.

AND, in consideration of the premises, the Grantor does hereby covenant with the Grantees that the Grantor is seized of the property herein described in fee simple; that said property is free and clear of and from all liens and encumbrances, except for the lien of real property taxes not yet by law required to be paid, and except as may herein specifically be set forth; that the Grantor has good right to sell and convey said property, as aforesaid; and, that the Grantor will WARRANT AND DEFEND the same unto the Grantees against the lawful claims and demands of all persons, except as aforesaid.

The rights and obligations of the Grantor and the Grantees shall be binding upon and inure to the benefit of their respective estates, heirs, personal representatives, successors, successors in trust and assigns. All obligations undertaken by two or more persons shall be deemed to be joint and several unless a contrary intention shall be clearly expressed elsewhere herein.

The conveyance herein set forth and the warranties of the Grantor concerning the same are expressly declared to be in favor of the Grantees, as Tenants by the Entirety, with rights of survivorship.

This sale is made pursuant to 11 U.S.C. Section 363 (f) and the order of the United States Bankruptcy Court entered on February 21, 1990, in said Case No. 84-00371.

The terms "Grantor" and "Grantees", as and when used herein, or any pronouns used in place thereof, shall mean and include the masculine or feminine, the singular or plural number, individuals or corporations and their and each of their respective successors, heirs, personal representatives and assigns, according to the context thereof. If these presents shall be signed by two or more Grantors or by two or more Grantees, all covenants of such parties shall for all purposes be joint and several.

IN WITNESS WHEREOF, the Grantor has executed these presents on the day and year first above written.

/s/ Lillian Hagopian Corey
LILLIAN HAGOPIAN COREY,
both individually and as
debtor-in possession

Grantor

STATE OF HAWAII)
) ss:
CITY AND COUNTY OF HONOLULU)

On this 22nd day of March, 1990, before me personally appeared LILLIAN HAGOPIAN COREY, individually and as debtor-in possession, to me known to be the person described in and who executed the foregoing instrument and acknowledged that she executed the same as her free act and deed.

/s/ Kenneth K. Gakai
Notary Public, State of Hawaii

My commission expires: 1/18/93

EXHIBIT "A"

ALL of that certain parcel of land situate on the Haleakala Road (Federal Aid Project 5B) at Omaopio, Kula, County of Maui, State of Hawaii, being a portion of L.C.Aw. 281B to Ali, and being more particularly described in File Plan 382 as follows:

LOT 2: BEGINNING at a ¾" pipe at the northwest corner of Lot 2 and on the east side of Haleakala Road, F.A.P. 5B, the coordinates of which point referred to H.G.S. Trig. Station "Puu Pane" being 10493.0 feet south and 3064.8 feet east, and running by azimuths measured clockwise from true south:

1.	285°	59′		438.47	feet along the Roman Catholic Mission's portion of L.C.Aw. 281B to Ali to a ¾" pipe;
2.	8°	46′	30″	359.46	feet along Lot 3 of L.C.A. 342 to a ¾" pipe;
3.	98°	45′	30″	473.45	feet along Lot 3, Lucy R. Holt's portion of L.C.Aw. 281B to Ali to a ¾" pipe;
4.	Thence along the Halaakala Road, F.A.P. 5B, along the arc of a circular curve to the right with a radius of 2939.93 feet, the direct azimuth and distance of the sub chord being				
	193°	29′	58″	67.79	feet to a ¾" pipe;
5.	194°	11′		348.62	feet along the Haleakala Roal, F.A.P. 5B, to the point of beginning, containing an area of 4.05 acres.

BEING the property conveyed to Lillian H. Corey by Bessie Hagopian by deed dated July 1, 1973, and recorded in the Bureau of Conveyances of the State of Hawaii in Liber 9808 at page 315;

TOGETHER WITH the improvements thereon and the rights, easements, privileges, and appurtenances thereunto belonging and appertaining.

END OF EXHIBIT "A"

APPENDIX E

SECURITY TITLE CORPORATION

HEREBY CERTIFIES THAT THE ATTACHED

IS A TRUE COPY OF THE ORIGINAL DOCUMENT

FILED IN THE BUREAU OF CONVEYANCES

OF THE STATE OF HAWAII

AS REGULAR SYSTEM DOCUMENT NO. 90-58048

ON APRIL 24, 1990 AT 8:01 AM

By: /s/ [Illegible]

LAND COURT SYSTEM REGULAR SYSTEM

AFTER RECORDATION, RETURN BY MAIL ( ) PICKUP (X)

Security Title Corporation

IVAN M. LUI-KWAN
PRESLEY W. PANG
2200 Pacific Tower
Bishop Square
1001 Bishop Street
Honolulu, Hawaii 96813
Tel. No. (808) 523-2500

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

Civil No. 52308

HERBERT H.K. LOUI and ALBERTA K.A. LOUI,
Plaintiffs,

vs.

LILLIAN HAGOPIAN COREY,
Defendant.

SATISFACTION OF JUDGMENT AND RELEASE OF JUDGMENT LIEN

[Filed April 19, 1990]

COME NOW HERBERT H.K. LOUI and ALBERTA K.A. LOUI, Plaintiffs in the above-entitled matter, and hereby acknowledge full satisfaction of the judgment en-

tered herein on May 11, 1984, against Defendant LILLIAN HAGOPIAN COREY; and do hereby release their judgment lien on the real property of said Defendant, said Judgment having been recorded in the Bureau of Conveyances of the State of Hawaii in Liber 17870, Page 319.

DATED: Honolulu, Hawaii, April 18th, 1990.

/s/ Herbert H.K. Loui
HERBERT H.K. LOUI
Plaintiff

/s/ Alberta K.A. Loui
ALBERTA K.A. LOUI
Plaintiff

STATE OF HAWAII)
) ss.
CITY AND COUNTY OF HONOLULU)

On this 15th day of April, 1990, before me personally appeared HERBERT H. K. LOUI and ALBERTA K. A. LOUI, to me known to be the persons described in and who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed.

/s/ [Illegible]
Notary Public
State of Hawaii

My commission expires: 6/24/90

APPENDIX F

UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF HAWAII

Case No. 84-00371
(Chapter 11)

ORDER GRANTING MOTION FOR AUTHORITY TO SELL PROPERTY FREE AND CLEAR OF LIENS AND OTHER INTERESTS; EXHIBIT A

Hearing Date: February 12, 1990 at 1:30 p.m.

Assigned to The Honorable Martin Pence

IN RE LILLIAN HAGOPIAN COREY,
Debtor.

ORDER GRANTING MOTION FOR AUTHORITY TO SELL PROPERTY FREE AND CLEAR OF LIENS AND OTHER INTERESTS

[Filed Feb. 21, 1990]

On February 12, 1990, the Debtor's Motion for Authority to Sell Property Free and Clear of Liens and Other Interests, filed on February 1, 1990, came on for hearing. The hearing was attended by Walter R. Schoettle, Esq. on behalf of The Auna Foundation, Kulalani, Ltd., and Florence A. Ellis, Ivan M. Lui-Kwan, Esq. on behalf of creditors Herbert H.K. and Alberta K.A. Loui, and James N. Duca, Esq. on behalf of Lillian Hagopian Corey, the Debtor.

The Court having considered the pleadings and records on file herein and the argument of counsel, and good cause therefor appearing, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1) The actual and potential prejudice to the Debtor likely to result from any continuance of the hearing is

not offset by any credible showing that the continuance of the hearing is likely to generate a purchase of the property described in the Motion on terms more favorable to the estate and its creditors. No security to indemnify the Debtor from loss or damages resulting from any delay has been offered. The request for a continuance is denied.

2) Those persons who have filed objections to the Motion have been adjudicated to have no interest as creditors of this estate nor any ownership or other interest in the property described in the Motion. The judgments and decision on appeal to that effect have not been stayed.

3) The sale in question is contemplated by the plan of reorganization previously confirmed by this Court, and proceedings to authorize the sale of this property were commenced by Debtor prior to the confirmation of the plan. The sale is, in all material respects, consistent with the plan. Although the plan provides that the sale will be preceded by the Debtor's payment to the Loui creditors of $500,000.00 in cash and the instant sale contemplates only a $200,000.00 cash payment, that $500,000.00 payment was solely for the benefit of the Loui creditors, who have the authority to waive that requirement and, under the terms of the instant purchase, have done so. The Debtor's cash payment to the Louis of $200,000.00, rather than $500,000.00, operates to the benefit of all creditors of the estate other than the Louis. The Motion does not involve any material modification of the plan.

4) Approval of the Motion is consistent with the letter and spirit of the decision of the Ninth Circuit Court of Appeals in *In re Ellis*, —— F.2d —— (9th Cir. 12/27/89) (slip. op. at 14728), which directs that this case is at an end.

5) This sale is authorized under 11 U.S.C. Section 363(f)(1), because non-bankruptcy law permits the sale

of the subject property free and clear of any interest of the objecting parties or persons claiming by, through or under them. It is also authorized under 11 U.S.C. Section 363(f)(4) because the interest of the objecting parties and persons claiming by, through or under them is in genuine dispute, to the extent that this dispute has not already been conclusively resolved in the Debtor's favor. Herbert H.K. and Alberta K.A. Loui have consented to the sale.

6) The proposed sale and settlement will result in a net benefit to the estate in excess of $1,009,000.00, which is the approximate amount still owing by the Debtor to the Louis under the judgment and allowed secured claim in their favor. The payment of the Louis' claim is secured by liens on the subject property and all other real property assets of the estate, which will be satisfied by the sale. The sale is in the best interests of the estate and its creditors, and will relieve the Debtor of continuing liability for interest at the rate of approximately $211.00/day.

For the foregoing reasons, LILLIAN HAGOPIAN COREY, as debtor-in-possession and in her individual capacity, is hereby authorized and directed to sell to Herbert H.K. and Alberta K.A. Loui the property described in the annexed Exhibit A, free and clear of all other interests, on the terms and conditions specified in the "Settlement and Purchase Agreement" of January 26, 1990.

DATED: Honolulu, Hawaii, Feb. 20, 1990.

/s/ [Illegible]
Judge of the Above-Entitled Court

In re LILLIAN HAGOPIAN COREY; Case No. 84-00371 (Chapter 11), Order Granting Motion for Authority to Sell Property Free and Clear of Liens and Other Interests; Exhibit A.

EXHIBIT A

ALL of that certain parcel of land situated on the Haleakala Road (Federal Aid Project 5B) at Omaopio, Kula, County of Maui, State of Hawaii, being a portion of L.C.Aw. 281B to Ali, and being more particularly described in File Plan 382 as follows:

LOT 2: BEGINNING at a ¾" pipe at the northwest corner of Lot 2 and on the east side of Haleakala Road, F.A.P. 5B, the coordinates of which point referred to H.G.S. Trig. Station "Puu Pane" being 10493.0 feet south and 3064.5 feet east, and running by azimuths measured clockwise from true south:

1.	285°	59′		438.47	feet along the Roman Catholic Mission's portion of L.C.Aw. 281B to Ali to a ¾" pipe;
2.	8°	46′	30″	359.46	feet along Lot 3 of L.C.A. 342 to a ¾" pipe;
3.	98°	45′	30″	473.45	feet along Lot 3, Lucy R. Holt's portion of L.C.Aw. 281B to Ali to a ¾" pipe;
4.	Thence along the Haleakala Road, F.A.P. 5B, along the arc of a circular curve to the right with a radius of 2939.93 feet, the direct azimuth and distance of the sub chord being				
	193°	29′	58″	67.79	feet to a ¾" pipe;
5.	194°	11′		348.62	feet along the Haleakala Road, F.A.P. 5B, to the point of beginning, containing an area of 4.05 acres.

BEING the property conveyed to Lillian H. Corey by Bessie Hagopian by deed dated July 1, 1973, and recorded in the Bureau of Conveyances of the State of Hawaii in Liber 9808 at page 315;

TOGETHER WITH the improvements thereon and the rights, easement, privileges, and appurtenances, thereunto belonging and appertaining.

APPENDIX G

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF HAWAII

BK No. 84-00371
Chapter 11

IN RE LILLIAN HAGOPIAN COREY,
Debtor-Appellee,

LILLIAN HAGOPIAN COREY,
Plaintiff-Appellee,
vs.

KULALANI, LTD., *et al.*,
Defendants-Appellants.

RENEWED EX PARTE SUGGESTION OF RECUSAL
BY THE HONORABLE MARTIN PENCE

[Filed Nov. 4, 1988]

On August 19, 1988, the undersigned filed an ex parte suggestion in BK No. 84-0371 that the Honorable Martin Pence disqualify himself, pursuant to Sec. 455(a), 28 U.S. Code, because his partiality might reasonably be questioned from the record of *sua sponte* proceedings on the issue of ownership of Silversword Inn.

Without the benefit of transcript, the suggestion was based upon extraordinarily disparaging "findings" announced on June 24, 1988, at the conclusion of several days of hearings. Although a copy was ordered from the Ms. Brooke Iverson, court reporter, on June 25, 1988 (and

the original on July 25, 1988), the transcript was not available when the prior suggestion of recusal was filed on August 19, 1988, nor is it yet available.

At a hearing on August 24, 1988, the Court denied the recusal suggestion, as follows:

> * * * As Mr. Ellis points out in his suggestion, he makes no affidavit. He simply quotes therein from my decision of recent date in this particular case some statements I made therein, the law is clear. Settled since 1966, even before that, in *U.S. versus Grinnell*, United States Supreme Court case and before that, *U.S. versus Berger* (phonetic), oh, that was many, many years ago, that any statements made by the judge based upon what has occurred before him in court, in other words, are not grounds for his recusal. Any statements must come from extra judicial sources.
>
> Now, that same law has been applied in the Ninth Circuit, 1987 in *Hasbrouk versus Texaco*, 880 Fed Second, 1513 and *Hansen versus C.I.R.*, in the Ninth Circuit, 820 Fed Second, 1464 and right in this own court—did I say—yeah in this own court, Judge King applied it in, *In Re Manoa Finance Company, Inc.* and affirmed in 781 Fed Second, 1370.
>
> This Court has had, this judge has had the same problem before me many, many times. The law is clear from the *Grinnell* and the *Berger* cases. The allegations of bias and prejudice must come from extra judicial sources. All the statements from which Mr. Ellis indicated in his suggestion that I recuse myself, came from judicial sources. The suggestion is denied. (RT, 8/24/88, pp. 1-2.)

The undersigned respectfully renews his suggestion that the Honorable Martin Pence disqualify himself, pursuant to Title 28, U.S. Code, Secs. 455(a) and/or 455(b)(1),

for the reasons that his impartiality might reasonably be questioned and/or he has a personal (extrajudicial) bias and prejudice concerning the undersigned.

This renewed suggestion is based upon transcripts of proceedings on estimation of claims (RT, 4/27/88, 4/28/88) and approval of the Chapter 11 liquidation plan (RT, 5/27/88).

Berger v. United States, 255 U.S. 22, 32-34, 41 S.Ct. 230, 65 L.Ed. 481 (1922) is the seminal case interpreting what is now Section 144, Title 28, U. S. Code. *United States v. Azhocar*, 581 F.2d 735, 738, (9th Cir. 1978).

Berger does not use the word "extrajudicial." Rather, at 31, the *Berger* court relies upon *Ex parte American Steel Barrel Co.*, 230 U.S. 35 as establishing,

> * * * that the bias or prejudice which can be urged against a judge must be based upon something other than rulings in the case.

The Third Circuit, in *Johnson v. Trueblood*, 629 F.2d 287, 291 (3rd Cir. 1980) explains extrajudicial *bias* that disqualifies a judge from proceeding further in a case, as follows:

> "Extrajudicial bias" refers to a bias that is not derived from the evidence or conduct of the parties that the judge observes in the course of proceedings. *See United States v. Grinnell Corp.*, 384 U.S. 563, 580-83, * * *

The undersigned is not a party to Adv. Pro. No. 85-0175 nor Adv. Pro. No. 72-391(3) & (4). He had not appeared before Judge Pence in either of said proceedings, except as an officer of certain defendants on a discovery motion.

The undersigned appeared as a party in interest before Judge Pence in BK No. 84-0371 for the first time on April 27 and 28, 1988, on the estimation of assigned

claims. Neither he nor the Debtor testified or otherwise presented any evidence in the course of those proceedings to support the *pretrial* determination on May 27, 1988, that the undersigned is a wheeler and dealer whose advice to the Debtor is the root cause of the LOUIS' judgment against her, which Judge Pence expressed as follows:

> * * * You are a very intelligent woman. You are a well educated woman. And I notice over this time that you've been before me, due to your association with a husband who was a lawyer, *due to your association with Ellis, who is not a lawyer but who is a wheeler and dealer with a lot of legal ideas* that you have, yourself, acquired a lot of knowledge about law and legal obligations. * * * (RT, 5/27/88, p. 2-15, emphasis added.)
>
> * * * [T]he judgment that you owe some $700,-000.00 because you couldn't deliver the property [Silversword Inn]. And the reason, as you know and I know, that you couldn't deliver the property was because Ellis had made a deal with you one way and you thought it mean that you owned the property, and he said "Oh, no." That he had the right to buy it back, and the Court of Appeals held that that constituted sort of a mortgage so that it would—document instead of a deed that you were getting. *This is all Ellis and his wheeling and dealing and you happen to be the sucker for it. I heard you say that you relied upon his advice* and see where his advice put you. It put you into the Court here today with me telling you that you're stuck. * * * (*Id.*, p. 2-18, emphasis added.)

The "wheeler and dealer" bias against the undersigned, as expressed by Judge Pence in *ex parte* colloquy with the Debtor on May 27, 1988, is clearly "a bias that is not derived from the evidence or conduct of the parties that the judge observes in the course of the proceedings."

Johnson v. Trueblood, supra. The bias is obviously personal (i.e., extrajudicial), even though expressed from the bench.

In *Connelly v. United States Dist. Court*, 191 F.2d 692 (9th Cir. 1951), at 696 and 697, the Ninth Circuit comments on the "solicitude" of Congress in providing for disqualification of judges by affidavit (Section 144), quoting and adding emphasis to *Berger* 255 U.S. at page 35, 41 S.Ct. at page 234:

> * * * that the tribunals of the country shall *not only* be impartial in the controversies submitted to them but shall give *assurance* that they *are* impartial, free, to use the words of the section, from any 'bias or prejudice" that might disturb the normal course of impartial judgment.

The Ninth Circuit Court continues, at 697:

> It is not enough that the judge, despite his predetermination of essential facts, may put them aside and conduct a fair trial but that there also shall be such an atmosphere about the proceeding that the public will have the "assurance" of fairness and impartiality. * * *

The cases cited by Judge Pence on August 24, 1988, and those cited *supra* relate primarily to Section 144, which places the burden of an aggrieved litigant to make a timely and sufficient affidavit.

Congress, in its solicitude that the tribunals of the country shall *not only* be impartial in the controversies submitted to them but shall give *assurance* that they *are* impartial, free from any "bias or prejudice" that might disturb the normal course of impartial judgment, in 1948 placed the burden of recusal upon the judiciary itself under the circumstances set forth in Section 455 of Title 28. The statute mandates, in pertinent part, as follows:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in

which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party * * *

Without specific reference to Section 455, the Sixth Circuit analogizes in *Knapp v. Kinsey*, 232 F.2d 458, 465, extrajudicial (i.e., personal) bias and prejudice manifest prior to trial with the manifestation of bias and prejudice in the course of judicial proceedings, as follows:

> Bias or prejudice on the part of the judge may exhibit itself prior to the trial by acts or statements on his part. Or it may appear during the trial by reason of the actions of the judge in the conduct of the trial. If it is known to exist before the trial it furnishes the basis for disqualification of the judge to conduct the trial. Section 144, Title 28, U.S. Code. [quoting] This statutory provision is not directly applicable to proceedings wherein the claimed bias or prejudice appears during the course of the trial. However, there would seem to be a close analogy between bias and prejudice which would disqualify a judge from sitting in a judicial proceeding and the bias and prejudice appearing during the course of the proceedings which would render the judgment therein invalid. * * *

Since the undersigned was unaware of the pretrial bias and prejudice manifest in *ex parte* proceedings on May 27, 1988, he could not prepare a timely pretrial affidavit disqualifying Judge Pence pursuant to Section 144.

> * * * When the remarks of the judge during the course of a trial, or his manner of handling the trial, clearly indicate a hostility to one of the parties,

> or an unwarranted prejudgment of the merits of the case, or an alignment on the part of the Court with one of the parties for the purpose of furthering or supporting the contentions of such party, the judge indicates, whether consciously or not, a *personal* bias and prejudice which renders invalid any resulting judgment in favor of the party so favored. * * * (*Knapp v. Kinsey, supra*, at 466, emphasis added.)

Whether consciously or not, the Honorable Martin Pence has clearly indicated by all of the conduct described in the above quotation from *Knapp v. Kinsey*, a *personal* (*i.e.*, extrajudicial) bias and prejudice which mandates *sua sponte* recusal pursuant to Sections 455(a) and/or 455(b)(1), applying the rationale of Ninth Circuit and U.S. Supreme Court rulings on the earlier Section 144.

The Fifth Circuit, in *N.L.R.B. v. Phelps*, 136 F.2d 562, 563-64, ise also in accord:

> * * * [A] fair trial by an unbiased and non-partisan trier of the facts is of the essence of the adjudicatory process * * * Nor will the fact that an examination of the record shows that there was evidence to support the judgment, at all save a trial from the charge of unfairness, for when the fault of bias and prejudice in a judge first rears its ugly head, its effect remains throughout the whole proceeding. Once partiality appears, and particularly when, though challenged, it is unrelieved against, it taints and vitiates all of the proceedings and no judgment based upon them may stand.

On the record presently available, partiality against the undersigned and in favor of the Debtor, and predisposition of the merits of the Silversword Inn ownership issue, first appeared in *ex parte* colloquy between the Debtor and Judge Pence on May 27, 1988.

This extrajudicial bias and prejudice is respectfully challenged by invoking the Congressional mandate of Section 455, one of the "checks and balances" in our constitutional system of government. The undersigned expresses his constitutional right to be relieved against continued bias and prejudice in these proceedings by respectfully *suggesting* the *sua sponte* recusal of the Honorable Martin Pence.

DATED: Honolulu, Hawaii, November 4, 1988.

Respectfully submitted,

/s/ William S. Ellis, Jr.
WILLIAM S. ELLIS, Jr.
Creditor-Appellant, *pro se*

Certificate of Service. I hereby certify service of a copy of this paper upon Helen B. Ryan, trustee, James M. Duca, Esq., and Walter R. Schoettle, Esq., by mail or delivery on November 4, 1988.

/s/ William S. Ellis, Jr.
WILLIAM S. ELLIS, Jr.